Furthermore section 14 of the Act provides that —

"Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved."

It may be convenient at this point, to refer to the case of *Public Prosecutor* v. *Yuvaraj*[4] where Lord Diplock delivering the judgment of the Board dealing with the presumption of corruption said —

"Where a defendant is charged with an offence under section 4(a) of the Prevention of Corruption Act, 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, viz. (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed 'unless the contrary is proved'."

And speaking of the burden of rebutting the presumption, His Lordship said —

"... upon the true construction of the Evidence Ordinance and the Prevention of Corruption Act 1961, there is, in their Lordships' view, no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question reserved for the consideration of the Federal Court, if the expression in the first part of the question: 'the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable' is understood as meaning 'the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961'."

In the present case the learned President said —

"I rejected the defence is being untrue. I considered whether it could have been reasonably true but in view of the conclusive evidence came to the conclusion that it could not even have been so. I applied the test laid down by Suffian J. (as he then was) in *Mat* v. *Public Prosecutor*."[5]

It would seem to me that after carefully considering the defence, the learned President made a specific finding of fact, namely, that there was no truth in the defence story. In his view, it could not even be reasonably true. In this regard it would suffice for me to say that in the light of the overwhelming evidence which points to the guilt of the appellant, I see no reason at all to disagree with the learned President's finding. Speaking of rebuttal evidence, I would with respect, cite the case of *Attan bin Abdul Gani* v. *Public Prosecutor*[6] where the late Sharma J. had this to say —

"The learned president considered the defence of the appellant. I have given it careful thought and consideration and have asked myself whether it does raise any reasonable doubt in the prosecution case but the only answer I can find is 'No.' I have again asked myself 'Could what the appellant says be reasonably true?' and again I am, on the examination of the evidence, unable to answer that question in the affirmative. . . ."

Earlier on His Lordship said —

"... The presumption cannot be said to have been rebutted without sufficient evidence, i.e. such evidence as is reasonably sufficient to invite belief in its probable truthfulness. It was very strongly urged that as the defence was one of non-receipt of the money there was no onus on the appellant to prove 'the contrary' suggested in section 14. The argument is fallacious because the presumption comes into operation only when the factum of payment is proved as it was to the satisfaction of the learned president in this case. If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary."

In consideration of the whole of the arguments put forward before me and in the light of the evidence shown on record which I have very carefully reviewed, I would not hesitate to say that there is no merit whatever in the appeal against the conviction. The appeal against conviction on both charges is therefore dismissed.

As for the appeal against sentence, the learned President in his judgment said that nothing was said by defence counsel in mitigation. He quite rightly took into account the appellant's position as a police officer but it is also a fact that the appellant will lose his job as a result of the conviction. An imprisonment of two and a half years would in the circumstances of this case be rather excessive. I will therefore allow the appeal against sentence. In so doing, I am not saying that an offence of this nature must be viewed less seriously. All I am saying is that an imprisonment of one year would in the instant case be adequate punishment and in my view sufficiently deterrent to any police officer who would venture to obtain a bribe. I set aside sentence of two and a half years' imprisonment on each charge and substitute therefore one year's imprisonment on each charge with effect from today, sentences to run concurrently.

*Order accordingly.*

Solicitors: *Datuk Balwant Singh & Co.*

---

## YAP KI SWEE v. PHUA THIAM LAI

**[A.C.J. (Syed Othman J.) September 14, 1974]**
**[Kuantan — Civil Appeal No. 6 of 1972]**

*Family Law — Maintenance — Failure of husband to comply with maintenance order — Whether wife entitled to apply for an order for husband to be sentenced to imprisonment — Right of husband to be heard — Audi alteram partem — Married Women and Children (Maintenance) Order, 1950, ss. 4 and 10.*

The respondent had been ordered to pay maintenance to his wife and children. He defaulted for three months and the appellant applied for an order that the respondent be sentenced to imprisonment for having wilfully neglected to comply with the maintenance order. The learned president of the Sessions Court refused to make the order as he felt that the respondent should be given a chance to pay the arrears and that he should be heard before an order was made to send him to prison. The appellant appealed.

**Held,** dismissing the appeal: the learned president was right in refusing to issue the commitment warrant merely on the complaint of the wife and without giving the husband an opportunity of being heard.

*Case referred to:-*

(1) *Laxmi Narain* v. *State* 1959 A.I.R. Allahabad 556.

CIVIL APPEAL.

*S. Sivasubramanian* for the appellant.

Respondent in person.

**Syed Othman J.:** The respondent was ordered to pay $350 a month for maintenance of the appellant,

his wife, and children. He defaulted payments for 3 months. The appellant applied for an order that the respondent be sentenced to imprisonment under section 4 of the Married Women and Children (Maintenance) Ordinance, 1950 (the Ordinance) for having wilfully neglected to comply with the maintenance order. The application was supported by an affidavit. When the matter came up for hearing the learned president refused to make the order as he felt that the respondent should be given a chance to pay the arrears ($1,050) and that the respondent should be heard before he could order him to be sent to prison; and he ordered the respondent to pay the arrears before a date. The appeal is against the refusal by the learned president to issue the commitment warrant on the application.

The respondent has now paid the arrears. Nonetheless Mr. Sivasubramanian for the appellant has urged me to consider the appeal and to determine whether the learned president was right in not having issued the commitment warrant on a complaint on oath that the husband had neglected to comply with the maintenance order. Section 4, it is argued, appears to allow the court to issue the warrant on such complaint.

I understand the procedure that has been followed varies from court to court. I agree with Mr. Sivasubramanian that it is necessary to indicate what is required to be shown and done before a distress or commitment warrant can be issued under the section, which reads:

"4. If any person wilfully neglects to comply with any order made under the provision of this Ordinance, the court, which made such order may, for every breach thereof, by warrant, direct the amount due to be levied in the manner by law provided for levying fines imposed by such court, or may sentence him to imprisonment of either description for a term which may extend to one month for each month's allowance remaining unpaid".

Section 10 of the Ordinance requires that all applications to a court shall be made and heard substantially in the same manner as in the procedure laid down in the previous legislation referred to in the schedule. The requirement of hearing, in my view, connotes the application of the principle of *audi alteram partem i.e.* no judicial order can be made affecting the rights of a person, unless a reasonable opportunity has been given to him to show why it should not be made. Besides in my view the very wording of section 4 itself implies the exercise of judicial discretion. The court before issuing a distress or commitment warrant must be satisfied that the person complained against has wilfully neglected to comply with a maintenance order. There must be a hearing or inquiry in the presence of the husband.

It should be observed that the section empowers the court to pass sentence of imprisonment which may extend to a month. I cannot see how proper sentence could be assessed merely on the complaint of non-compliance of the maintenance order, without the husband being present in the court. It must be in the contemplation of the legislature that the husband must be present before sentence can be passed.

The procedure adopted in India under similar provisions can be found in *Sohoni's* "The Code of Criminal Procedure" 12th edition 1962 volume III at page 2712. I can see no reason why it cannot be followed here. What is said there may be summarised for our purpose thus: On an application by a wife for enforcement of a maintenance order, a notice is issued to the husband. The court then holds an inquiry in his presence, unless he fails or refuses to do so. The wife must prove (1) the husband was ordered to pay maintenance, (2) he neglected to comply with the order, and (3) the neglect was wilful.

In *Laxmi Narain* v. *State*[1] the wife obtained a maintenance order. Some months later she applied for enforcement of the order alleging non-payment of any allowance. On the same date the magistrate ordered a process to be issued. He did not issue any notice to the husband. He did not make any inquiry whether the husband's failure to pay maintenance was for sufficient cause. It was held that an order passed by the magistrate without issuing a notice and holding an inquiry was illegal.

Under section 488(3) of the Indian Criminal Procedure Code equivalent to section 4 of the Ordinance, the words "wilfully neglects" have been replaced by the words "fails without sufficient cause". Perhaps our legislature may be minded to make this amendment and other amendments too (see the Indian provisions).

I also consider that there should be some provision prescribing the procedure to be followed. I do not think section 10 of the Ordinance, which refers to the procedure laid down in the repealed provisions, is satisfactory. The repealed sections 360 to 364 of the old F.M.S. Criminal Procedure Code which apply to Pahang, a former state within the Federated Malay States, did not even prescribe any procedure. The old provisions have in fact been embodied in the Ordinance with some modifications.

On the facts disclosed in the present case, I hold that the learned president was right in refusing to issue the commitment warrant merely on the complaint of the wife and without giving the husband an opportunity of being heard.

The appeal is dismissed.

*Appeal dismissed.*

Solicitors: *S. Sivasubramanian & Co.*